

SEP 10 2008

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILFREDO RAMON BARBERENA-
HERNANDEZ,

Petitioner,

v.

MICHAEL B. MUKASEY, Attorney
General,

Respondent.

No. 05-77223

Agency No. A27-540-382

MEMORANDUM *

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted September 8, 2008**

Before: TASHIMA, SILVERMAN, and N.R. SMITH, Circuit Judges.

Wilfredo Ramon Barberena-Hernandez, native and citizen of Nicaragua,
petitions for review of the Board of Immigration Appeals' ("BIA") order denying
his motion to reopen deportation proceedings to adjust status under the Nicaraguan

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without
oral argument. *See* Fed. R. App. P. 34(a)(2).

Adjustment and Central American Relief Act of 1997 (“NACARA”), Pub.L. No. 105-100, 111 Stat. 2160, *as amended by* Pub.L. No. 105-139, 11 Stat. 2644, and denying his motion to adjust status pursuant to an approved visa petition. Our jurisdiction is governed by 8 U.S.C. § 1252. We review the BIA’s decision for abuse of discretion, *see I.N.S. v. Doherty*, 502 U.S. 314, 315, 323 (1992), and we deny in part and dismiss in part the petition for review.

The BIA did not abuse its discretion in denying as untimely Barberena-Hernandez’s motion to reopen because the motion was filed at least seven years after the deadline for relief under NACARA, *see* 8 C.F.R. § 1003.43(e)(1) (requiring motions to reopen to apply for NACARA relief be filed by September 11, 1998), and nine years after the deadline relevant for adjustment of status, *see* 8 C.F.R. § 1003.2(c)(2) (requiring motions to reopen be filed within 90 days of the final administrative decision or by September 30, 1996). Barberena-Hernandez has failed to demonstrate that equitable tolling is appropriate in his case. *Cf.* *Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003) (recognizing equitable tolling where an alien is prevented from timely filing a motion to reopen due to his counsel’s deception, fraud, or error, as long as the petitioner acts with due diligence); *see also* 8 C.F.R. § 245.13(d)(5)(i).

Because he did not exhaust the argument before the BIA, this court lacks jurisdiction to review Barberena's contention that he was eligible for equitable tolling on the basis of his receipt of employment authorization. *See Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004).

PETITION FOR REVIEW DENIED in part; DISMISSED in part.